IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-695

---

LILLIAN H. BOSCH, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FRANK J. HOLROYD, JR.
Counsel for Petitioner
1900 Main Building
Sarasota, Florida 33577
(813) 955-0176

May 25, 1979

# INDEX



## Authorities Cited

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. _____

---

LILLIAN H. BOSCH, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on Februrary 26, 1979.

## OPINIONS BELOW

The opinion of the District Court for the Middle District of Florida is reported at 76-2 USTC #9651 and is printed in Appendix B attached. The opinion of the Court of Appeals for the Fifth Circuit, which reversed the judgment of the District Court, is reported at 590 F.2d 165 and is printed in Appendix A attached.

## JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit, printed in Appendix A attached, was entered on February 26, 1979. The jurisdiction of the Court is invoked under 28 U.S.C. S 1254(1).

## QUESTION PRESENTED

Did the Court of Appeals for the Fifth Circuit err in holding that under Florida law a divorce court decree awarding the wife a special equity in the property of the husband constituted a division of property between co-owners with the result that the wife's basis in the property she received was equal to the amount the husband paid for the property when purchased?

## STATUTES INVOLVED

The statutes involved are Internal Revenue Code of 1954 (26 U.S.C.) Section 1001(a), Computation of Gain or Loss, which provides

> The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 1011 for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

and Internal Revenue Code of 1954 (26 U.S.C.) Section 1012, Basis of Property-Cost, which provides

> The basis of property shall be the cost of such property, except as otherwise provided in this subchapter and subchapters C (relating to corporate distributions and adjustments), K (relating to partners and partnerships), and P (relating to capital gains and losses). The cost of real property shall not include any amount in respect of real property taxes which are treated under section 164(d) as imposed on the taxpayer.

## STATEMENT OF THE CASE

Petitioner commenced this action in the United States District Court for the Middle District of Florida seeking a refund of federal income taxes in the amount of $33,649.61 for the 1964, 1965 and 1966 tax years, plus interest and costs.



By order dated August 20, 1976, the District Court ruled in favor of petitioner and on September 17, 1976, the District Court entered judgment in favor of petitioner in the amount of $38,630.43, plus statutory interest.

The judgment of the District Court was appealed and by opinion dated February 26, 1979, the United States Court of Appeals for the Fifth Circuit reversed the judgment of the District Court.

The case was submitted to the District Court upon stipulated facts summarized as follows:

On July 25, 1949, petitioner married Bart Leland Michler, and remained married to him until their divorce on June 12, 1957.

During the time of petitioner's marriage to Michler, petitioner advanced $115,144.50, which sums were used to improve approximately 3500 acres of land which were in the name of Michler alone.

In the Final Decree of Divorce, the Court recognized and there was awarded to petitioner as a special equity, a one-third interest in the 3500 acres and, in a subsequent partition of land, petitioner received 1142 acres for her one-third interest. This property was conveyed to petitioner by a fee simple deed dated October 2, 1962.

The original cost of the 1142 acres to Michler amounted to $3.00 per acre or $3,426.00. Petitioner's costs of the partition suit amounted to $18,000.00 and petitioner received $29,100.00 as her portion from mortgages held by both parties at the time of the divorce.

During the years 1964, 1965 and 1966 petitioner sold parts of the 1142 acres in a total of four sales. In computing gain and loss petitioner used the fair market value of the property as of the date the property was conveyed to her as her basis under Section 1012 of the Internal Revenue Code of 1954. The net gain reported for all sales was $15,531.14.

Following an examination of the returns for these years, the Internal Revenue Service determined that petitioner should have used the actual investment in the property as her basis in computing the gains. The gains determined by the Internal Revenue Service from the four sales, using actual investment as the basis, was $151,641.87, and additional income taxes, including other unrelated adjustments, in the total sum of $36,558.00 were assessed.

Petitioner paid the additional income taxes assessed by the Internal Revenue Service and subsequently filed timely claims for refund in the total sum of $33,649.61. The claims for refund were rejected and this action was commended.

## REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the Fifth Circuit should be reviewed because it erroneously concludes that a wife who is awarded a special equity in the real property of her husband in a Florida divorce proceedings is a co-owner of the property with her husband prior to the award and that the award amounts to a division of property between co-owners.

### I

The income tax consequence of the transfer of the real property to petitioner by her husband is controlled by the unanimous decision of this Court in *U.S. v. Davis*, 370 U.S. 65 (1962).

The *Davis* case concerned residents of the State of Delaware and involved a transfer of appreciated property from a husband to a wife pursuant to the terms of a property settlement agreement executed prior to a divorce.

The property transferred to the wife included 1000 shares of capital stock of E. I. duPont, deNemours & Co. which was the property of the husband alone.



Under Delaware law a wife has certain statutory material rights including rights of dower, a right of intestate succession and a right upon a divorce to a share of husband's property. In the property settlement agreement the wife agreed to accept the property transferred to her pursuant to the terms of the agreement in full satisfaction of any claims she had against the husband.

The issue before this Court in *Davis* was whether the wife took as her basis in the stock transferred to her by her husband the market value at the time of transfer or the basis of the stock in the hands of the husband.

This Court held that the transfer from the husband to the wife was in exchange for the release of marital rights by the wife and therefore any appreciation in the value of the property transferred was properly taxable to the husband.

This Court also held that the transfer from the husband to the wife was not a nontaxable division of property between co-owners:

> ...the inchoate rights granted a wife in husband's property by the Delaware law do not even remotely reach the dignity of co-ownership. The wife has no interest — passive or active — over the management or disposition of her husband's property. Her rights are not descendable, and she must survive him to share in his intestate estate. Upon dissolution of the marriage she shares in the property only to such an extent as the Court deems "reasonable..."
>
> 370 U.S. at 70.

In analyzing the extent of the marital rights of a wife under Delaware law this Court concluded that the result was to place a burden on the property of the husband rather than make the wife a co-owner.

> In the present context the rights of succession and reasonable share do not differ significantly from the husband's obligations of support and alimony. They all partake more of a personal liability of the husband

> than a property interest of the wife. The effectuation of these marital rights may ultimately result in the ownership of some of the husband's property as it did here, but certainly this happenstance does not equate the transaction with a division of property by co-owners.
>
> 370 U.S. at 70.

This Court acknowledged that the income tax consequences of transfers between husband and wife in divorce proceedings may vary from state to state depending upon the property laws of the state involved. In this respect the property laws of the State of Florida, discussed below, must be considered in applying the rule of *Davis* to the pending action.

After it was determined in *Davis* that the transfer of the stock from the husband to the wife was a taxable event as to the husband this Court then held that the amount received by the husband, the release of the marital rights of the wife, was necessarily equal to the market value of the property received by the wife. Therefore the wife's basis in the stock was the market value at the time it was transferred to her.

In *Davis* the stock was transferred to the wife by the husband pursuant to the terms of a property settlement agreement executed by the husband and wife. In the pending action the real property was transferred to the wife by the husband pursuant to an order of court in a Florida divorce action. In *Pulliam v. Commissioner* 329 Fed. (2d) 97 (CA-10, 1964), the Court held that whether the property was transferred pursuant to the terms of a property settlement agreement or pursuant to an order of court was not a material difference.

## II

Special equity is a doctrine that has developed in the Courts of the State of Florida over the past sixty years. A simple and modern definition is set forth in 10A Fla. Jur. *Dissolution of Marriage,* Section 73, as follows:



> There are two circumstances under which an award may be made to the wife based on her special equities in her husband's property: (1) where the wife has contributed financially to the husband's business or acquisition of property, and (2) where her personal services contributed materially to the husband's acquisition of property. Such an allowance is only warranted by special facts and circumstances in favor of the wife for her contributions to the husband's property accumulations, above and beyond the performance of marital duties, and the burden of proof is on the wife to sustain her claim of a special equity.

See Also Florida Family Law, (CLE 2d ed 1972), Section 22.17, published by the Florida Bar.

> When a spouse has contributed labor and services, or advanced money that was used in her spouse's business, she may request a determination by the court of her equitable interest in the business. Masiolotti v. Masilotti, 150 Fla. 86, 7 So. 2d 132 (1942); Green v. Green, 228 So. 2d 112 (3d D.C.A. Fla. 1969), cert. den. 237 So. 2d 538. Further, if the spouse contributed money or labor to the acquisition of real property the title to which may have been placed in her spouse's name, she may be entitled to a special equity in it. Buckalew v. Buckalew, 115 So. 2d 564 (2d D.C.A. Fla. 1959)
>
> Factors to be proved in order to obtain a determination of special equities in favor of a spouse include the performance by the spouse of services beyond ordinary marital duties, Tanner v. Tanner, 194 So. 2d 702 (2d D.C.A. Fla. 1967), cert. den. 201 So. 2d 560, and material contributions by the spouse, either financially or by personal services to the other spouse's business or acquisition of property, Wollman v. Wollman, 235 So. 2d 315 (3d D.C.A. Fla. 1970).
>
> The burden is on the spouse establishing the special equity to prove to the exclusion of a reasonable doubt

that he has a legal or equitable interest in and to the other spouse's property. Lindley v. Lindley, 84 So. 2d 17 (Fla. 1955); Tanner v. Tanner, supra.

The court must rule on the spouse's claim as to his special equities. Henderson v. Henderson, 226 So. 2d 699 (4th D.C.A. Fla. 1969).

See also *Strauss v. Strauss,* 148 Fla. 23, 3 So. 2d 727 (1941), *Buckalew v. Buckalew,* 115 So. 2d 564 (2d. D.C.A. Fla. 1959) and *Tanner v. Tanner,* 194 So. 2d 702 (2d D.C.A. Fla. 1967).

The special equity doctrine became a part of Florida divorce law as a result of the decision of the Florida Supreme Court in *Carlton v. Carlton,* 78 Fla. 252, 83 So. 87 (1919). No earlier cases have been found and it does not appear that the Florida Supreme Court adopted the rule as a result of court decisions in any other jurisdiction. The *Carlton* case was a three paragraph per curiam decision and, because of its importance, is quoted in its entirety as follows:

A divorce was granted to the husband upon the statutory grounds of habitual indulgence in violent and ungovernable temper and extreme cruelty, and the chancellor denied the wife's application for alimony and she appealed. There is sufficient testimony to support the decree of divorce; but we think the circumstances of this case require some provision to be made for the wife out of the husband's property.

The appellant is the mother of the appellee's six children. She generously contributed in funds and by her personal exertion and industry through a long period of time to the acquisition and development of his home and other property and the establishment of his fortune. This gives her a special equity in the property which she aided in acquiring and preserving.

The portion of the decree granting a divorce is affirmed, but that portion which denied her any maintenance is reversed, and the cause is remanded for appropriate proceeding in awarding her a reasonable allowance for her maintenance and support.



The *Carlton* case again appeared before the Florida Supreme Court five years later and in a two paragraph decision, quoted in its entirety, the Court in *Carlton v. Carlton,* 87 Fla. 460, 100 So. 745 (1924), decided:

On a former appeal herein a decree granting a divorce to the husband and denying alimony to the wife was affirmed as to the divorce and reversed as to the alimony, the cause being remanded for appropriate proceedings awarding the wife a reasonable allowance for her maintenance and support. Carlton v. Carlton, 78 Fla. 252, 83 South. 87.

Subsequently an appeal was taken from an order denying a motion made by the complainant to dismiss the proceedings on the ground that his divorced wife had married. The Chancellor states in his order that he would have granted the motion, but denied it only because he regarded the opinion of this court as holding the defendant divorced wife to have a "special equity in the property" of the husband. Some of the language of the opinion is not clear, but its import is that under the circumstances of the case as stated the divorced wife should equitably have from the husband a reasonable allowance for her maintenance and support. As the divorced wife has married, she is not entitled to alimony or maintenance and support (1 R.C.L. 950); therefore the order appealed from is reversed, and the cause is remanded, with directions to dismiss the proceedings.

A close reading of the *Carlton* decision leads, it appears, to the conclusion that although the Supreme Court determined that a wife was entitled to a special equity in the property of her husband, the award was in the nature of alimony and maintenance and under Florida law could not be paid to a wife who had remarried prior to the time

that the award had been made. This conclusion is supported in *Vance v. Vance,* 143 Fla. 513, 197 So. 128 (1940), in which the Florida Supreme Court simply referred to the special equity award to the wife in the *Carlton* case as alimony.

> In the Carlton cases, there was no property settlement involved. There was a decree of divorce and Mrs. Carlton was awarded alimony on the theory that she had contributed to the estate of the husband during their married life but this part of the decree was cut off when she remarried.

In *Smith v. Smith,* 90 Fla. 824, 107 So. 257 (1925), the Florida Supreme Court again held that a special equity was in the nature of permanent alimony.

> And the court below was without error in denying permanent alimony. In such cases, the allowance of permanent alimony is not justified, as was held by this court in Phinney v. Phinney, 82 So. 357, 77 Fla. 850, unless special equities, such as form the basis of the decisions in Carlton v. Carlton, 83 So. 87, 78 Fla. 253, also same case in 100 So. 745, 87 Fla. 460, and Raborn v. Raborn, 87 So. 50, 81 Fla. 51, warrant a departure from a general rule. Such special equities do not appear in the instant case.

See also *Gill v. Gill,* 107 Fla. 588, 145 So. 758 (1933), in which the court held as follows:

> In Phinney v. Phinney, 77 Fla. 850, 82 So. 357, this court held that our statute did not warrant permanent alimony to the former wife in a suit for divorce by the husband when she was wholly at fault. This rule is approved in other states when there are no mitigating circumstances and the husband has committed no breach of marital duty, but does not apply when the husband has not been entirely free from blame, or when the husband and wife have acquired property jointly, or when the wife has contributed personally to



> the husband's estate, either from her industry or from her own property.

In addition to the contributions of money or labor by the wife to the property of the husband, the Florida Supreme Court appears to have considered the length of the marriage in determining whether the wife is entitled to a special equity in the property of the husband. This is especially true where the wife's claim is based on services. In *Welsh v. Welsh,* 160 Fla. 380, 35 So. 2d, 6 (1948) it was acknowledged that the wife had worked in her husband's store. The Florida Supreme Court nevertheless held that the wife was not entitled to a special equity and emphasized that the parties had only been married eight years and that there were no children born of the marriage. On the other hand, in *Dupree v. Dupree,* 156 Fla. 455, 23 So. 2d 554 (1945), the husband and wife had been married 31 years, four children had been born and two survived. The Florida Supreme Court held that the wife was entitled to a special equity. The court went on to say that it was preferable to award the wife a special equity in the husband's property rather than alimony because alimony would not be payable after the husband's death and he was not in good health.

> Alimony has to do with things to eat and wear and those who strive diligently are entitled to both. By this standard the parties to this cause are in the clear. They both labored and contributed to the joint estate. She is shown to have contributed thousands of dollars besides her labor which aided materially to the defendant's estate. Much of what both contributed was, doubtless, spent foolishly but there is no showing that it was spent criminally. At any rate, she is entitled to eat and live in as good style as he is, which she cannot do on account of a disparity in their estate.
>
> Appellant has reached the age in which her earning ability is on the decline. The award of alimony runs with the life of defendant and he is shown to be in precarious health. Her children are also entitled to parti-

cipate in what she has contributed to earn. They supported their mother's contention.

It is accordingly our judgment that appellant should have been awarded an equity in appellee's estate under the rule announced in Carlton v. Carlton, 78 Fla. 252, 83 So. 87; Engebretson v. Engebretson, 151 Fla. 372, 373, 11 So. 2d 322, and like cases.

The Florida Supreme Court has, on occasion, referred to the special equity of the wife as an equitable property right acquired by the wife during marriage. However, it is clear that the special equity doctrine developed in Florida as a judicially created form of alimony and that the wife's equitable property right is not established until the judge in the divorce proceedings, after considering a numbr of factors, determines that the wife is entitled to the award. The award is based on what the wife did with respect to the property or business during marriage and in that sense the right is acquired during marriage. The award of a special equity to the wife depends on a number of factors, not all totally related to contribution to the property. Support and maintenance alimony, likewise, depends not only upon the needs of the wife for support and maintenance and the abiity of the husband to pay but also upon such extrinsic facts as duration of marriage, conduct and prior marriage. Florida Family Law (CLE 2d ed), Section 22.4.

The special equity doctrine developed in the State of Florida when the Florida Supreme Court felt that it was necessary to prevent a totally inequitable result in a divorce proceedings in a situation, not covered by existing law, in which a husband could receive the benefits of the wife's contribution to his property without the wife receiving anything in return. Thus, the doctrine developed solely to protect the wife in a divorce situation. There does not appear to be any authority to the effect that the Florida Supreme Court intended to make the wife a co-owner of the husband's property, either legal or equitable, except upon divorce and then only if the judge in the divorce proceedings, after considering a number of factors, was satisfied that the award of a special equity should be made.



Before a wife can be awarded a special equity in the property of her husband upon a divorce the award must be supported by special pleadings. In *Wood v. Wood,* 104 So. 2d 879 (3d D.C.A. Fla. 1958) the Court stated:

> Such an award must be supported by pleadings and evidence establishing an equity or right to the husband's share or interest in the property.

See, also, *Steinhauer v. Steinhauer,* 252 So. 2d 825 (4th D.C.A. Fla. 1971):

> However, upon proper pleadings and sufficient and proper proof, the husband's interest in the estate by the entireties can be awarded to the wife as lump sum alimony or to the extent that she establishes a special equity therein.

The burden of proving the right to a special equity interest in the property of her husband rests with the wife and proof must be to the exclusion of all reasonable doubt. *Lindley v. Lindley,* 84 So. 2d 17 (Fla. 1955); *Roberts v. Roberts,* 101 So. 2d 884 (2d D.C.A. Fla. 1958); see, also, *Tanner v. Tanner, supra:*

> Just as in cases involving a constructive trust, the evidence to establish the equity of the wife must be so clear, strong, and unequivocal as to remove from the mind of the chancellor every reasonable doubt as to the existence of her special equity.

Adjudication of the special equity must be made by the trial judge and cannot be made by an appointed commissioner. See *Margolis v. Margolis,* 343, So. 2d 938, (3d D.C.A. Fla. 1977):

> Upon the dissolution of marriage the jointly held property vested, as a matter of law, as tenants in common. It was the responsibility of the trial judge to adjudicate any special equity. Therefore, we find error in the appointment of the commissioners.

Under Florida law at the time the petitioner and her husband were divorced and as the law has remained since

that time, absent of any judicial determination otherwise, upon divorce, the separate property owned by each spouse remains that spouse's property, and if the husband and wife own real property as tenants by the entirety the husband and wife become tenants in common. Section 689.15, Florida Statutes, *Hoke v. Hoke,* 202 So. 2d 118 (4th D.C.A. Fla. 1967); *Steinhauer v. Steinhauer, supra.* The wife does not have to specially plead and prove her property rights to her separate property or to property held by the husband and wife as tenants by the entirety. It is only when the wife attempts to acquire an interest in the property of her husband that a completely different set of rules apply. The wife's claim can only be established in a divorce proceeding. The claim must be supported by special pleadings. She must establish her claim by clear, strong and unequivocal evidence and adjudication must be made by the trial judge.

It is clear that the wife's claim to an interest in the property of her husband arises out of the marital relationship and is therefore a marital right. The procedures that a wife must follow under Florida law to establish her claim are not consistent with a co-ownership interest with her husband.

The wife has no control over the management of the property. She cannot convey her special equity interest in the property of her husband prior to the time it is awarded to her in the divorce proceedings. She cannot devise it by will and it will not pass by intestacy if she dies without a will. The special equity interest of the wife cannot be attached by her creditors.

The special equity interest of the wife under Florida law does not reach the dignity of co-ownership as that term is defined by the U.S. Supreme Court in *U.S. v. Davis,* 370 U.S. 65 (1962). It follows that the transfer of the real property to the petitioner by her husband upon their divorce was not a division of jointly owned property but was rather a transfer from the husband to the wife in satisfaction of her marital rights and was therefore a



taxable event to the husband. The petitioner is entitled to use as her basis in the property the market value of the property at the time of the transfer.

## III

In Rev Rul 74-347, 1974-2 Cum Bul 26, the Internal Revenue Service considered a question of the income tax consequences of the transfer to a wife in a divorce proceeding of a portion of husband's interest in jointly owned property.

The facts upon which the ruling was based were that neither the husband nor the wife had received any significant gifts or inheritances during the marriage, that both were employed throughout the marriage, and that their earnings were comingled.

At the time of the divorce the total assets owned by the husband and the wife amounted to $110,000.00. The jointly owned property amounted to $70,000.00. The husband's separately owned property amounted to $40,000.00. The wife had no separately owned property.

In the divorce decree the wife was awarded $55,000.00 of the jointly owned property and the husband was awarded the remainder of the jointly owned property and all of the separately owned property.

The Internal Revenue Service ruled that the husband realized gain on the transfer of the jointly owned property to the wife in exchange for the release of her marital rights to the extent that the fair market value of the property transferred exceeded his adjusted basis.

In considering the extent of the wife's interest in her husband's separately owned property the Internal Revenue Service observed:

> The married couple did not reside in a community property state at the time of divorce. Under the applicable estate law, the wife's interest in her husband's separately owned property was not the equivalent of co-ownership since her only rights in her husband's

> separately owned property were either inchoate *or entitled her to an equitable distribution of property upon divorce.* (Emphasis added.)

The Internal Revenue Service reviewed *U.S. v. Davis*, 370 U.S. 65 (1962) and then stated the instances in which property will be considered as co-owned under the *Davis* rule, as follows:

> Property may be co-owned where (1) title to it is taken jointly under State property law, (2) the State is a community property law State, or (3) State property law is bound to be similar to community property law.

In the pending case there is no contention by either party that petitioner and her husband took title to any of the real property in question jointly under Florida property law and there is no contention by either party that Florida is a community law State or that the Florida property law is similar to community property law. It necessarily follows that if Rev Rul 74-347 is followed petitioner and her husband cannot be considered as co-owners of any real property which was in the name of her husband alone.

## CONCLUSION

For the reason set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANK J. HOLROYD, JR.
1900 Main Building
Sarasota, Florida 33577
(813) 955-0176

May 25, 1979



LILLIAN H. BOSCH, *Plaintiff-Appellee*
v.
UNITED STATES OF AMERICA,
*Defendant-Appellant*

No. 76-4144

UNITED COURT OF APPEALS,
FIFTH CIRCUIT

FEB. 26, 1979

In income tax refund suit, the United States District Court for the Middle District of Florida, at Tampa, Wm. Terrell Hodges, J., entered judgment for taxpayer, and the United States appealed. The Court of Appeals, Tuttle, Circuit Judge, held that under Florida law, Florida divorce decree awarding special equity to wife in real estate which was in husband's name constituted a division of existing property interest, and did not constitute a taxable event to the husband, and thus his basis and hers continued to be the amount he paid for the land when purchased, rather than value on date of divorce decree or on date of partitioning decree five years later.

Reversed and remanded.

**Internal Revenue key #457**

Under Florida law, Florida divorce decree awarding special equity to wife in real estate which was in husband's name constituted a division of existing property interest, and did not constitute a taxable event to the husband, and thus his basis and hers continued to be the amount he paid for the land when purchased, rather than value on date of divorce decree or on date of partitioning decree five years later.

John L. Briggs, U.S. Atty., Jacksonville, Fla., Eleanore J. Hill, Asst. U.S. Atty., Tampa, Fla., Myron C. Baum, Acting Asst. Atty. Gen., Tax Div., Dept. of Justice, Washington, D. C., Gilbert E. Andrews, Chief, Jonathan S. Cohen, Atty., Arthur L. Bailey, Atty., R. Bruce Johnson,

Appellate Section, Tax Div., Dept. of Justice, Washington, D. C., for defendant-appellant.

Frank J. Holroyd., Jr., Sarasota, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before BROWN, Chief Judge, TUTTLE and HILL, Circuit Judges.

TUTTLE, Circuit Judge:

This appeal challenges the correctness of the trial court's determination of the taxpayer's basis in land which she acquired pursuant to a Florida divorce decree and which she sold during the tax years in question. The basis approved by the trial court was the fair market value of the land on the date of the transfer to her some five years after the taxpayer obtained the divorce from her husband. The United States contends that the basis should be the actual cost of the land to the husband when it was acquired during the marriage.

The facts are not in dispute. During her marriage to her former husband, the taxpayer advanced $115,144.50 of her own funds to her husband for use in improving approximately 3500 acres of land, title to which was in her husband's name. On the basis of this financial contribution, the Florida divorce court recognized a "special equity" which the taxpayer held in the improved land.

The court's decree included the following finding:

> That the defendant (husband) is the owner of approximately 3500 acres of land, which is in the name of the defendant solely, but which have been managed and improved by the use of the plaintiff's money, and in which the plaintiff has a special equity.

The decree, based on this and other findings, contained the following provision: "The plaintiff is entitled to and is hereby awarded a one-third interest in and to approximately 3500 acres of land in Pasco County, Florida, title to



which is in the name of the defendant alone."[1] The court retained jurisdiction over the suit until the children should become of age and "for the purpose of partioning the real property which is owned by each and both of the parties hereto." Five years later, the court entered an order actually partitioning the land between the former husband and wife.

Having sold 175 acres of this land during the tax years in question, the taxpayer claimed as her basis in the land the fair market value on the date of the final decree.[2] The taxpayer returned as gain on the sale the difference betweenr market value on the date of final partition and therice. She paid the amount of an additional assessment based on the government's theory, and then filed her suit for a refund.

The trial court, relying upon *United States v. Davis,* 370 U.S. 65, 82 S. Ct. 1190, 8 L. Ed. 2d 335 (1962), agreed with the taxpayer, holding that "a special equity may ultimately result in the ownership of some of the husband's property but this does not equate the (divore court decree) with a division of property by co-owners, 370 U.S. at 71, 82 S. Ct. 1190."

As was true in *Davis*, a determination of the correct basis of the 1142 acres of Mrs. Bosch's land depends upon whether the state court decree assigning it to her at the time of the divorce was a taxable event as to the husband's ownership in the land. Simply stated, if the court decree represented a tradeoff of the wife's claimed marital rights for the one-third interest in the 3500 acre tract, then under the Supreme Court's decision in *Davis*, this would be a

[1]The decree also made other awards, such as the family automobile and certain furnishings and furniture, generally in the nature of alimony, and a certain amount for child support.

[2]At oral argument, the taxpayer conceded the government's position that even if the divorce decree was the "taxable event" with reference to which the market value should be determined, then it was that date, rather than the date of the partitioning decree as to which the fair market value determination was to be made.

taxable event to the husband, and the wife's basis would be the fair market value of the land on the date of the decree. If, on the other hand, the court's judgment amounted to a decree awarding to the wife an interest in property which existed prior to the divorce, the basis would be the original cost to the husband when he acquired the land.

The parties agree that the question whether this decree was a division of property interests between the parties or was an award in lieu of alimony is to be resolved by reference to state law. Florida has long recognized a "special equity" in a wife where she has made identifiable contributions to her husband's property during marriage even though the special equity only comes into actual identifiable form upon the termination of the marriage status. This special type of interest favoring a wife seems to have been a development during the years when the common law prevailed to the extent that on marriage all of the wife's property automatically became her husband's and, in the event of a divorce in which the wife was the guilty party, she was cast adrift with no right to alimony.

It cannot be questioned that in the development of this species of property the Florida courts have considered the right of the wife who contributed substantially to her husband's estate during marriage as a "vested" right. This was made clear in *Heath v. Heath,* 103 Fla. 1071, 138 So. 796 (1932), in which it was also made clear that there is a distinction between such a special equity and alimony. In the *Heath* case, the husband was awarded a divorce on the ground of his wife's adultery, but the trial court awarded the wife $2,000 for her equitable interest in the husband's business and property although at that time the award could not have been made as alimony because a Florida statute specifically prohibited the award of alimony to an adulterous wife. 2 Comp.L.Fla. § 1932 (1914). In *Heath,* the Florida Supreme Court said:

> There is undoubt[ed] proof that the wife materially assisted the husband in the conduct of his business of



> operating a chain of stores and that she put into her husband's business a substantial amount of her own capital in addition to what personal services she rendered. Whatever consequences the wife may be compelled under the law to suffer for her marital derelictions by the severance of the bonds of matrimony, she is not required to incur the forfeiture of any of her *already vested* equitable property rights which were acquired by her while the matrimonial barque was sailing on smoother seas. See *Carlton v. Carlton,* 78 Fla. 252, 83 So. 87; *Taylor v. Taylor,* 100 Fla. 1009, 130 So. 713.
>
> The provisions of section 4987, Comp. Gen. Laws, section 3195, Rev. Gen. St. to the effect that no alimony shall be granted to an adulterous wife, do not preclude the ascertainment and allowance by the court of an amount to the wife for her special equity in property and business of the husband toward which she is shown to have contributed materially in funds and industry through a period of years while the marriage remained undissolved.
>
> Such an allowance is not alimony and should never be made in any case unless shown to be warranted by special facts and circumstances which support a finding of an equity in the husband's property arising in favor of the wife from contributions of funds and services made by her toward its accumulation over, above, and beyond the performance of ordinary marital duties toward the husband.

103 Fla. at 1075, 138 So. at 797 (emphasis added) In *Dupree v. Dupree,* 156 Fla. 455, 23 So. 2d 554 (1945), the Florida Supreme Court reversed the judgment of a divorce court which had declined to award a special equity to the wife although the record showed without dispute that she had contributed substantially to the assets of the couple. The Supreme Court drew a distinction between alimony, which expires upon the death of the husband, and an award of an interest in the estate which survives the husband's death.

The court's decision was based upon the earlier Florida cases of *Carlton v. Carlton,* 78 Fla. 252, 83 So. 87 (1919) and *Engebretson v. Engebretson,* 151 Fla. 372, 11 So. 2d 322 (1942).

The wife's special equity interest in Florida differs materially from the interest at issue in *United States v. Davis.* There, the thousand shares of stock awarded to the wife were given under the terms of a property settlement in which the wife expressly relinquished all of her marital rights. As noted by the Supreme Court,

> [T]he then Mrs. Davis agreed to accept this division "in full settlement and satisfaction of any and all claims and rights against the husband whatsoever (including but not by way of limitation, dower and all rights under the laws of testacy and intestacy)..."

370 U.S. at 66-67, 82 S. Ct. at 1191. Nothing in the Delaware law appears to create an interest such as the "special equity" recognized in the Floida cases.

The taxpayer points to the inchoate character of the wife's interest and thus equates her situation with the corresponding party in *Davis.* She says that "if the wife contributes labor or services which are significant in the acquisition of property by the husband she may be entitled tial equity in the property upon divorce." As we read the Florida cases, they hold that, given the contributions of the wife, the divorce court *must* grant the special equity. In *Dupree,* The Florida Supreme Court reversed the judgment of the divorce court which had refused to make such an award but had granted the wife alimony.

We conclude that the Florida divorce court decree awarding the special equity to the wife in this case constituted a division of existing property interests, and it did not constitute a taxable event to the husband. His basis, and thus hers, continued to be the amount he paid for the land when purchased.

The judgment is REVERSED and the case is RE-



MANDED for further proceedings not inconsistent with this opinion.

LILLIAN H. BOSCH, *Plaintiff*

v.

UNITED STATES OF AMERICA, *Defendant.*

U. S. DISTRICT COURT,
MIDDLE DIST. FLA., TAMPA DIV.,

No. 74-762-Civ-T-H, 8/10/76

[Code Sec. 1012]

Taxable gain: Sale of property received pursuant to divorce decree: Property basis: Original cost v. fair market value at time of receipt. — Taxpayer, who was awarded a one-third interest in 3500 acres of land as a special equity pursuant to a divorce decree, properly used the fair market value of the property at the time she acquired it, plus commissions and selling expenses incurred, in determining her taxable gain upon sales of the property in 1964, 1965, and 1966. Back reference: † 4516.555.

Frank J. Holroyd, Jr., 1900 Main Bldg., Sarasota, Fla., for plaintiff. Claude H. Tison, Jr., Assistant United States Attorney, Tampa, Fla., Rodger M. Moore, Department of Justice, Washington, D. C.., 20530, for defendant.

**Order**

Hodges, District Judge: Plaintiff, Lillian H. Bosch, brings this action for refund of income taxes and interest paid for the years 1964, 1965 and 1966. The case has been submitted to the Court for decision upon stipulated facts summarized as follows:

1. Plaintiff married Bart Leland Mickler (Mickler) in 1949 and remained married to him until their divorce in 1957.



2. During the marriage, Plaintiff advanced $115,144.50 to her husband for use in improving approximately 3500 acres of land which was held in the name of Mickler alone.

3. In the Final Decree of Divorce entered by the Circuit Court of the Sixth Judicial Circuit, Pasco County, Florida, Plaintiff was awarded a one-third interest in the 3500 acres as a special equity. In the subsequent partition of the land, Plaintiff received title to 1142 acres by a fee simple deed dated October 2, 1962.

4. The original cost of the 1142 acres to Mickler amounted to $3.00 per acre or $3,426.00. Plaintiff's costs of the partition suit amounted to $18,000.00 and Plaintiff received $29,100.00 as her portion from mortgages held by both parties at the time of divorce.

5. The 1142 acres include the following described tracts: Tract 1, containing 90 acres and having a fair market value of $83,448.28 at the time; Tract 2, containing 30 acres and having a fair market value of $40,199.00 at the time; Tract 3, containing 5 acres and having a fair market value of $22,750.15 at the time; Tract 4, containing 2 acres and having a fair market value of $1,663.40 at the time.

6. Plaintiff sold Tract 1 in 1964 for $87,471.60. The commission on sale and other selling expenses amounted to $9,627.18. Plaintiff claimed a loss on the sale of $5,604.46 on her tax return for the year 1964.

7. Plaintiff sold Tract 2 in 1965 for $67,500.00. The selling expenses amounted to $7,348.95. Plaintiff reported a gain on the sale of $19,952.05 on her tax return for the year 1965.

8. Plaintiff sold Tract 3 in 1965 for $25,000.00. The selling expenses amounted to $2,752.50. Plaintiff claimed a loss on the sale of $502.65 on her tax return for the year 1965.

9. Plaintiff sold Tract 4 in 1966 for $3,740.00. The selling expenses amounted to $390.40. Plaintiff reported a gain on the sale of $1,686.20 on her tax return for the year 1965.

10. The Internal Revenue Service determined that the sale of Tract 1 resulted in a gain to Plaintiff of $69,375.42 and assessed additional income taxes of $17,723.90, which included other unrelated adjustments not at issue in this case. The additional income taxes were paid and a claim for refund was filed with the District Director of Internal Revenue.

11. The Internal Revenue Service determined that the sale of Tract 2 resulted in a gain to Plaintiff of $57,328.05, that the sale of Tract 3 resulted in a gain to Plaintiff of $21,777.00, and it assessed additional income taxes of $18,007.55 which also included other unrelated adjustments not at issue in this case. The additional income taxes were paid and a claim for refund was filed with the District Director of Internal Revenue.

12. The Internal Revenue Service determined that the sale of Tract 4 resulted in a gain to Plaintiff of $3,161.40 and assessed additional income taxes of $826.55, which assessment included other unrelated adjustments not at issue in this case. The additional income taxes were paid and a claim for refund filed with the District Director of Internal Revenue.

13. The claims for refund for 1964, 1965 and 1966 taxes were rejected on December 11, 1972.

14. This suit for recovery of amount of deficiencies and all interest paid was commenced on August 8, 1974.

The issue presented to the Court is whether Plaintiff's basis in the real estate is established by the fair market value at the time she acquired title (as Plaintiff contends), or by the original cost plus contributions to the property recognized by the divorce decree (as Defendant contends). Plaintiff concedes that if Defendant's position is sustained, the dollar amount of the basis as determined by the Internal Revenue Service is correct.

Section 1012 of the Internal Revenue Code, 26 U. S. C. § 1012, provides that the basis of property shall be the cost of



such property. The transfer of property by the husband to his former wife pursuant to a property settlement agreement is a taxable event to the husband and the wife ac "cost" basis, i.e., market value of the property transferred. *United States v. Davis* [62-2 USTC † 9509], 370 U. S. 65, 82 S. Ct. 1190 (1962).

In *Davis*, the taxpayer husband urged that the property settlement was comparable to a nontaxable division of property between two co-owners. The government contended that the transaction was a transfer of property in exchange for the release of an independent legal obligation. The Supreme Court examined the wife's inchoate rights in her husband's property established by Delaware law and determined that the wife's rights did not rise to the level of co-ownership. Her rights were not descendable and became concrete upon dissolution of the marriage only to the extent deemed reasonable by the Court.

The ultimate determination to be made here is the nature of Plaintiff's interest in the property under Florida law *prior* to the divorce. The Government claims that the "special equity" recognized in the divorce decree was a vested interest in the property and, therefore, the partition of the property was merely a division between joint owners rather than an exchange for marital rights as in *Davis, supra*.

If a wife contributes money to the acquisition of property by the husband, she acquires a special equity which may be recognized upon divorce. See *c.g., Strauss v. Strauss,* 148 Fla. 23, 3 So. 2d 727 (1941); *Wood v. Wood,* 104 So. 2d 879 (3d DCA Fla. 1958); *Roberts v. Roberts,* 101 So. 2d 884 (2d DCA Fla. 1958). While a special equity may be awarded even when the wife is barred from alimony, *Heath v. Heath,* 103 Fla. 1071, 138 So. 796 (1932) any "vested equitable property rights" are recognized only upon divorce; and, even then, clear, strong and unequivocal evidence is required. *Tanner v. Tanner,* 194 So. 2d 702, 704 (2d DCA Fla. 1967). As in *Davis,* a special equity may ultimately result in the

ownership of some of the husband's property but this does not equate the transaction with a division of property by co-owners. 370 U. S. at 71, 82, S. Ct. at 1193.

Plaintiff correctly used a basis consisting of the fair market value of the property at the time title was placed in her name, plus sales commissions and other selling expenses, in determining the gain or loss on the sales of property during the years 1964, 1965 and 1966. Plaintiff is therefore extitled to judgment for the additional taxes assessed and paid plus interest for the years 1964, 1965 and 1966 less the amounts claimed as set-off by the Government (Paragraph 3 of the Stipulation).

Plaintiff's counsel shall submit a proposed form of judgment within twenty days of the date hereof.

IT IS SO ORDERED.

No. 79-695



# In the Supreme Court of the United States

OCTOBER TERM, 1979

---

LILLIAN H. BOSCH, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

---

WADE H. McCREE, JR.
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*

# In the Supreme Court of the United States

OCTOBER TERM, 1979

---

No. 79-695

LILLIAN H. BOSCH, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

---

The question presented in this federal income tax case is whether a state court decree awarding petitioner a "special equity" in certain property constituted a division of property between co-owners, or a disposition to her of her husband's property in satisfaction of her marital rights. If, as the court of appeals held, the transaction was a division of property, petitioner's basis in that property consists of her cash investment. On the other hand, if, as petitioner contends, the property was transferred to her in exchange for her marital rights, her basis in the property would be its fair market value as of the date of the decree.

The pertinent facts are undisputed and may be summarized as follows: During her marriage, petitioner advanced $115,144.50 of her own funds to her husband for use in improving approximately 3,500 acres of land,

title to which was in her husband's name. Petitioner and her husband were thereafter divorced. On the basis of her financial contribution, a Florida divorce court held that petitioner had a "special equity" in the improved land, and awarded her a one-third interest (Pet. 24-25; A. 36).[1] The land was eventually partitioned, and petitioner sold portions of it during 1966 (A. 58-59).

On audit, the Commissioner of Internal Revenue determined that petitioner's basis in the sold property was equal to her cash investment and determined deficiencies accordingly. In this refund suit brought by petitioner in the United States District Court for the middle District of Florida, the district court held that petitioner had received the property in exchange for her marital rights, and that her basis in the property sold was equal to its fair market value on the date of partition[2] (Pet. 28). The court of appeals reversed. It ruled that the award of "special equity" constituted a division of property between co-owners, and was not a taxable event creating a new basis in her share of the property (Pet. 22).

1. The court of appeals correctly held that petitioner's basis in the property was her cash investment in it rather than its fair market value on the date of partition. In *United States* v. *Davis*, 370 U.S. 65 (1962), this Court held that the federal tax consequence of the transfer of property incident to a divorce turns on the nature of the recipient spouse's interest in the property under state law. If the settlement is a division of property between

[1]"A." refers to the record appendix filed in the court of appeals.

[2]Petitioner conceded on appeal that even under her theory, the date for determining fair market value should have been the date of the divorce decree, rather than the date of partition, as determined by the district court (see Pet. 19 & n.2).



co-owners, it is not a taxable event to the transferor spouse and does not affect the basis of the transferee spouse. If, however, the settlement is a distribution of property in exchange for the release of marital rights by the transferee spouse as in *Davis*, the transfer is a taxable transaction requiring the transferor to recognize gain or loss and resulting in the transferee's having a basis in the property equal to the fair market value of the property.

Petitioner challenges the court of appeals' ruling that her "special equity" was a vested property interest under Florida law so that the divorce court's award of a one-third interest in the land constituted a division of property between co-owners, rather than a distribution to petitioner in exchange for her marital rights. But this Court sits to decide questions of federal, rather than state, law and, indeed, will not disturb an interpretation of state law by a court of appeals unless it is convinced that it is clearly erroneous or unreasonable. *United States* v. *Durham Lumber Co.*, 363 U.S. 522 (1960); *Helvering* v. *Stuart*, 317 U.S. 154 (1942).

Here, the court of appeals' interpretation of Florida law is completely in accord with the precedents of the Florida Supreme Court. In its decision, the court of appeals undertook an extensive analysis of Florida case law to determine the nature of petitioner's "special equity." The court noted (Pet. 20-22) that this doctrine developed during the years when the wife's property automatically became her husband's upon marriage, and when, in the event of a divorce in which she was the guilty party, she forfeited any right to alimony. Although the wife receives nothing for her marital rights in such a case her "special equity" cannot be forfeited. Thus, for

example, in *Heath* v. *Heath*, 103 Fla. 1071, 1074-1075, 138 So. 796, 797 (1932), the Florida Supreme Court awarded "special equity" to an adulterous wife, even though a Florida statute (Fla. Comp. Laws 1914, § 1932) specifically prohibited alimony. The court held that a wife's "special equities" are "already vested equitable property rights" that the wife had acquired during coverture. While she had forfeited her marital rights by misconduct, she had not forfeited her vested property rights. See also *Eakin* v. *Eakin*, 99 So. 2d 854 (Fla. 1958); *Engebretsen* v. *Engebresten*, 151 Fla. 372, 11 So. 2d 322 (1942).

As the court of appeals correctly concluded (Pet. 20-22), the distinction between "special equity" and ordinary marital rights is well established in Florida law. Unlike marital rights, "special equity" is recognized only when the contributions of the spouse in property or services are above and beyond the performance of ordinary marital duties. *Buckalew* v. *Buckalew*, 115 So. 2d 564 (Fla. Dist. Ct. App. 1959); *Steinhauer* v. *Steinhauer*, 252 So. 2d 825 (Fla. Dist. Ct. App. 1971); *Tanner* v. *Tanner*, 194 So. 2d 702 (Fla. Dist. Ct. App. 1967). The performance of spousal duties, even if arduous, or occasional help in the family business, will not suffice to give rise to "special equity." *Roberts* v. *Roberts*, 101 So. 2d 884 (Fla. Dist. Ct. App. 1958). The recognition of "special equity" is similar to the imposition of a constructive trust on the spouse's property, and accordingly must be proved by clear and convincing evidence sufficient to remove any reasonable doubt as to the other spouse's interest. See *Hoke* v. *Hoke*, 202 So. 2d 118 (Fla. Dist. Ct. App. 1967); *Lindley* v. *Lindley*, 84 So. 2d 17 (Fla. 1955); *Tanner* v. *Tanner*, *supra*. Furthermore, "special equity" is awarded according to the value of the property or services contributed, not according to the



financial needs and abilities of the parties. *Windham* v. *Windham*, 144 Fla. 563, 198 So. 202 (1940); *Wood* v. *Wood*, 104 So. 2d 879 (Fla. Dist. Ct. App. 1958).

Thus, a "special equity" under Florida law is entirely different from the property settlement at issue in *Davis*, where the reasonableness of the settlement was measured by such criteria as "the wife's financial condition, her needs in relation to her accustomed station in life, her age and health, the number of children and their ages, and the earning capacity of the husband" (370 U.S. at 70). Here, petitioner's property interest was measured only by the extent of her monetary investment in the development of the property, such monies having been her separate property. The divorce court's award allowed her to recover her appreciated investment. It was not an award in exchange for marital rights. Accordingly, the court of appeals correctly held (Pet. 22) that petitioner's award of "special equity" was a division of existing property interests.

2. Petitioner argues (Pet. 8-11) that the decisions of the Florida Supreme Court in *Carlton* v. *Carlton*, 78 Fla. 252, 83 So. 87 (1919), and 87 Fla. 460, 100 So. 745 (1924), require the conclusion that "special equities" are marital rights. The divorce decree in *Carlton*, however, did not involve a property settlement. See *Vance* v. *Vance*, 143 Fla. 513, 197 So. 128 (1940). All *Carlton* held was that in determining the proper amount of alimony, the divorce court could look to all the facts and circumstances, including the wife's contributions of services and property. Although these are the first Florida decisions to mention "special equity," they do not stand for the proposition that "special equity" is relevant only to awards of alimony. As the later Florida decisions make clear, "special equity" can also give rise

to a vested property interest, and may be awarded when alimony is prohibited by law. See, *e.g.*, *Heath* v. *Heath*, *supra*. Here, the divorce court awarded a one-third interest in the property to petitioner in recognition of her $115,000 investment in improving that property. That award was clearly not in the nature of alimony.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
*Solicitor General*

DECEMBER 1979

---

[3]Contrary to petitioner's argument (Pet. 15-16), Rev. Rul. 74-347, 1974-2 Cum. Bull. 26, is not inconsistent with the decision below. That ruling is predicated on the fact that neither husband nor wife brought any significant amount of property into the marriage, and they did not acquire any separate property by gift or inheritance. On those facts, only their jointly owned property was within the scope of the term "co-ownership." The ruling's reference to other situations that could give rise to co-ownership (*i.e.*, community property laws or laws equivalent thereto) does not preclude a finding of co-ownership under Florida law on the facts presented here.